TABLE OF CONTENTS

Page

Preliminary Statement 1-2

Statement of the Case 2-5

Argument 5-24

I. General 5-6

II. The Circuit Court of Appeals Properly Construed the Treaty Between the United States and Honduras Under the Facts of this Case and Writ Should Be Denied 6-18

III. Mississippi's Alien Statute and Escheat 18-19

IV. The Fiduciary Argument and Fair Play 19-20

V. Cases Distinguished 20-24

Conclusion 25-27

TABLE OF AUTHORITIES

Cases

Ahrans v. Ahrans, Iowa, 123 N.W. 164 13

Anderson v. Lewis, Freem. Ch. 178 (Miss. 1843) 17

Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515 (1924) 22

Bonds v. Bonds, 84 So. 2d 397 (Miss. 1956) 11

Clark v. Allen, 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947) 6,8,9

TABLE OF AUTHORITIES (Continued)

Page

Corbet v. Stergios, 126 N.W. 2d 342 (Iowa — 1964) 15

DeGeoffroy v. Riggs, 133 U.S. 258, 10 S. Ct. 295 (1890) 23

Dutton v. Donahue, 8 P. 2d 90, 79 A.L.R. 1355 (Wyo. 1932) 21

Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191 (1933) 20

Guiseppe v. Cozzani, 238 Miss. 273, 118 So. 2d 189 (1960); 248 Miss. 588, 159 So. 2d 278 (1964); and 193 So. 2d 549 (1966) 6,8,24

Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1880) 6,21

Johnson v. Robison, 94 S. Ct. 1160 (1974) 23

Jordan v. Tashiro, 278 U.S. 123, 49 S. Ct. 47 (1928) 22

Lawrence v. Mississippi State Tax Commission (1931) 162 Miss. 338, 137 So. 503; Affirmed, 286 U.S. 276, 52 S. Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374 (1932) 19

Miller v. Clausen, 8 Cir., (1924) 299 F. 723, Appeal Dismissed 269 U.S. 595, 46 S. Ct. 105, 70 L.Ed. 431, (1925) 12

Mississippi College v. May, 235 Miss. 200, 108 So. 2d 703 (1959) 19

Moody v. Hagan, et al (N.D. — 1971), 162 N.W. 704 21

Pierson v. Lawler, Neb., 161 N.W. 419 13

TABLE OF AUTHORITIES (Continued)

Page

Quong Ham Wah Co. v. Industrial Accident Commission, 192 Pac. 1021, 12 A.L.R. 1190, Error Dism., 255 U.S. 445, 41 S. Ct. 373 (Cal. 1920) 23,24

Scottish American Mortgage Company v. Butler, 99 Miss. 56, 54 So. 666 (1911) 7,19

Sugarman v. Dougall, 413 U.S. 634, 93 S. Ct. 2842 (1973) 23,24

Sullivan v. Kidd, 254 U.S. 433, 41 S. Ct. 158 (1920) 23

Tenorio v. McGowan, 364 F. Supp. 1051 (1973) 2,7

Tenorio v. McGowan, 510 F. 2d 92 (CA 5, 1975) 7

Todok v. Union State Bank of Harvard, Neb., 281 U.S. 449, 50 S. Ct. 363 (1930) 22

U.S. v. Boisdore's Heirs, 49 U.S. 113, 8 How. 113, 12 L.Ed. 1009 (Miss. 1850) 17

Weinberger v. Wisenfeld, 95 S. Ct. 1225 (1975) 24

Wilbe Lumber Company v. Calhoun, 163 Miss. 80, 140 So. 680 (1932) 20

Yeaker's Heirs v. Yeaker's Heirs, 61 Ky. 33, Affirmed 19 L.Ed. 571, (1862) 14

Treaties

Treaty of Friendship, Commerce and Consular Rights with Honduras, 45 Stat. at Large 2618 (December 7, 1927) 2,7

Article I 7,8,10,12,13,14,18

Article IV 7,8,9,12,13,14,17,18,21

TABLE OF AUTHORITIES (Continued)

Page

Statutes and Rules

Miss. Code 1892 ——
§ 2439 7

Miss. Code 1942 ——
§ 842 2,7,18

Miss. Code 1972 ——
§ 89-1-23 2,7,18

§ 89-11-1 19

13 Miss. Dig., Sec. 206, P. 318 17

Rules Supreme Court of the United States —
Rule 19 5

44 Stat. 2132 8

45 Stat. 2618 2

28 U.S.C. § 1331 2

Texts

3 Am.Jur. 2d. *Aliens and Citizens*, Sec. 34, P. 883 12

International Law by Charles Cheney Hyde, Second Revised Edition, Volume 1, Sec. 203, P. 650, et seq., *The Private Ownership and Control of Property* 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1586

DOROTEA ZALDIVAR V. DE TENORIO,
Petitioner,

versus

H. E. McGOWAN, ET AL.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Since Petitioner, in her Petition for Writ of Certiorari set out references to opinions below, made a statement of the grounds on which jurisdiction of this Court is invoked, the citation of statutory authorities, the Treaties and statutes involved and the questions presented for review, Respondent will not burden the record by repeating same.

When we make reference to matters contained in the Appendix to the Petition for Writ of Certiorari, we will

refer to same as "A.____". When we refer to matters contained in Volume 1 of the Appendix on file before the Fifth Circuit Court of Appeals, we will refer to same as "Apx. V. I, p. ____" and when we refer to exhibits before the United States Court of Appeals for the Fifth Circuit, we will refer to same as "Ex. Vol. II, p. ____".

STATEMENT OF THE CASE

Federal jurisdiction in this case was based upon the existence of Treaty questions. 28 U.S.C., § 1331, *Tenorio v. McGowan*, 364 F. Supp. 1051 (1973), (A. 3).

This case turned upon an interpretation of the Treaty of Friendship, Commerce and Consular Rights with the Republic of Honduras (45 Stat. 2618). Pertinent portions are set out in A. 88-92. The Mississippi common law and Mississippi Code prohibited Honduran Nationals from acquiring title to property in Mississippi (Mississippi Code 1942, § 842; Code 1972, § 89-1-23) (A. 93-94).

The land in question was acquired by Elbert J. McGowan by two deeds, one dated in 1911 and the other in 1915 (A. 3). About the year 1911 Elbert J. McGowan went to Central America (A. 3), returned to Clarke County, Mississippi, the home of his father and mother, and his brother, Hamilton E. McGowan only twice between the years 1911 and 1936. He wrote two letters to his family during that period of time and after a visit of about a week in 1936, told his niece and brother that he was going to return to Central America and never expected to return to the United States.

Thereafter no member of his family ever received any letter from him, knew of his whereabouts or saw him alive and he did not return to Clarke County, Mississippi prior to his death (Apx. 307-315). Between the years 1911 and 1936, H.E. McGowan used the land, paid taxes on same and did so "as a favor to his brother and for the use of said lands" (A. 16).

In 1940, Elbert married Maria Obdulia Zaldivar, a native Honduran woman, which marriage was not known by any member of his family until his death. On October 31, 1957, he died intestate, leaving his wife as his only heir (A. 4).

After the death of Elbert, H.E. McGowan, his brother, received a copy of an official notice of the death of Elbert from the Consul in Panama (A. 5, Ex. Vol. II, p. 6) which listed the then address of the widow in Panama and other known relatives as Hamilton E. McGowan, Vossburg, Mississippi, and Milton M. McGowan, Jackson, Mississippi, brothers of the deceased. The instrument further showed that the widow had received a copy of the report of death and all of his effects were in her hands. The information contained in the report of death came from the widow who received a copy of same and who, undoubtedly, made his Passport available to the Consul upon his death (A. 38). There is no proof in the record that she knew of the land in question in the State of Mississippi, but she did know of his two brothers and their address (A. 38-39). One year after Elbert died, his widow returned to Honduras and no member of his family had any knowledge of her address or whereabouts (Apx. 271).

There was an Intestate Succession, tantamount to our administration, after the death of Elbert and his widow was declared to be the owner of all of his property, real and personal, in Panama. She was represented by counsel (A. 38, Ex. Vol. II, D-1). She never communicated with either brother of the deceased, nor made any inquiry as to whether or not he left any land or estate in the State of Mississippi.

Although Petitioner states that after the death of his brother, Hamilton had the land tax assessment changed from "Elbert (E.J.) McGowan" to the "The E.J. McGowan Est.", the record does not so reflect. This is a supposition on the part of Petitioner (Apx. Vol. I, 338).

After the death of his brother, Hamilton used the land in all the ways such land was susceptible of being used, claiming it as his own and paying all taxes thereon. On August 14, 1968, he brought suit in the Chancery Court of Clarke County, Mississippi, claiming that he had acquired title to the land in question by "adverse possession" and by parol gift in 1936, the last time Elbert was at home. All of the brothers and sisters of Hamilton were made parties defendant and the unknown heirs of Elbert, if any, were made parties defendant but the widow was not made a party as such. Decree purported to confirm title in Hamilton (Ex. Vol. II, D-3).

There was no proof of a parol gift since Hamilton McGowan, the only witness who could have testified to same, was in extremely bad health under a doctor's care and advised by his doctor that he could not testify in the case (Apx. 1, p. 320). Even had he attempted to

testify he would have been barred on objection by the "Dead Man's Statute". From about the year 1951 until up to the date of the 1968 suit, the daughter of H.E. McGowan, who handled his business, continually tried to have the assessments changed into her father's name, but was unable to do so since there was no record title in him. This evidenced hostility, not only to his brother's title, but to the widow's title after his brother's death (Apx. 324-328).

Obdulia died intestate in Honduras on February 28, 1969, leaving as her sole heirs at law, her sister, Dorotea, and a brother, Felipe. She had made no effort before her death to comply with any of the provisions of the Treaty in question (A. 5). For an additional period of two years, the heirs of Obdulia did nothing to assert title to the land in question until oil was discovered in the area at which time she was "found" by oil men and executed an Oil Lease on February 1, 1971, and subsequent instruments later (Ex. Vol. II, p. 9). Suit was filed in this cause on April 12, 1971, some 14 years after the death of Elbert J. McGowan.

ARGUMENT

I. General

There are no special and important reasons as required by Rule 19, Rules Supreme Court of the United States, why this Court should grant certiorari. The decision of the Court of Apeals is not in conflict with any other decision of other Courts of Appeals or of the Supreme Court.

Although the Treaty with the Republic of Honduras in question has never been construed by any Appellate Court, the construction placed on the Treaty by the decision was essentially in accord with several other cases decided by the Supreme Court of the United States and the Supreme Court of several states.

Petitioner argues that some twenty-three Treaties with other Nations will be adversely affected by this decision as she did in her Petition for Rehearing and Petition for Rehearing En Banc before the Fifth Circuit Court of Appeal. This is just not borne out by the facts and was ably answered by the Court in denying the Petition for Rehearing and Rehearing En Banc in the Fifth Circuit Court of Appeals, Per Curiam, the Court saying that this argument was not so; that this case was decided on its own peculiar facts and does not damage "the fabric of the Honduran, or any similar Treaty." (A. 86-87).

II. The Circuit Court of Appeals Properly Construed the Treaty Between the United States and Honduras Under the Facts of this Case and Writ Should Be Denied

At the threshold of this argument, we concede that every Treaty made by authority of the United States is superior to the Constitution or Laws of any individual state. *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628 (1880); *Clark v. Allen*, 331 U.S. 503, 67 S. Ct. 1431, 91 L.Ed. 1633 (1947), and *Guiseppe v. Cozzani*, 238 Miss. 273, 118 So. 2d 189 (1960); 248 Miss. 588, 159 So. 2d (1964); and 193 So. 2d 549 (1966).

The Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Honduras was in effect at the time of the death of E. J. McGowan in 1957. The two Treaty Articles upon which the decision of the Fifth Circuit Court of Appeals as well as the decision of the lower Court was based, are Articles I and Article IV which are set out in the Appendix of the Petition on pages 88-92 and will not be repeated here.

The Mississippi statute which governs this matter is § 89-1-23, Miss. Code Ann. (1972), formerly Section 842 of Miss. Code of 1942, the essential portions of which go back to Section 2439 of Mississippi Code of 1892. This statute provides, in part, that "* * * non-resident aliens shall not hereafter acquire or hold land * * *". Aside from the statute, it is clear that under the common law of Mississippi, a non-resident alien could not *inherit* lands from a resident citizen. The controlling rule in Mississippi was announced in *Scottish American Mortgage Company v. Butler*, 99 Miss. 56, 54 So. 666 (1911), which rule of law was recognized in both the lower Court opinion (364 F. Supp. 1051 — A. 20) and the opinion of the Circuit Court of Appeals (510 F. 2d 92 — A. 45).

Petitioner attempts to persuade this Court, as she did the lower Court, that Article I of the Treaty is the controlling portion. She places complete reliance upon the language which appears in Article I that the aliens involved were entitled to, "the most constant protection and security for their persons and property, * * *. Their property shall not be taken without due process of law and without payment of just compensation." The trial Court engrafted upon Article I an ad-

ditional provision not appearing therein, that until the alien had knowledge or notice of the Treaty and of his inheritance, the three year period within which to sell provided in Section IV of the Treaty would not begin to run. This was in the face of the fact that there was not one scintilla of evidence offered by Petitioner in the trial of this case, other than apparent lack of knowledge of the provisions of the Treaty or knowledge of her inheritance, to justify the prolongation of the three year term in which to dispose of the property. In effect, the lower Court completely rewrote the Treaty and judicially read out of the Treaty Article IV. The Court adjudicated that Article IV of the Treaty does not mean what it says and that similar Articles in like Treaties for more than a century should be ignored.

Throughout this case, in both the lower Court, the Circuit Court of Appeals and in this Petition, Petitioner has argued that this particular Treaty is different from any other Treaty ever written and no other Treaty contains Article I and Article IV as does the Treaty in question. This just does not comport with the facts. The Treaty with Italy which was mentioned in the Mississippi case of *Guiseppe v. Cozzani*, 238 Miss. 273, 118 So. 2d 189 (1960); 248 Miss. 588, 159 So. 2d 278 (1964); and 193 So. 2d 549 (1966), contained the identical provisions of Article I and Article IV of this Treaty as did the Treaty in the case of *Clark v. Allen*, 331 U.S. 503, 67 S. Ct. 1431, 91 L.Ed. 1633 (1947). That Treaty may be found at 44 Stat. 2132. This fact was acknowledged in the opinion of the trial Court (A. 20-21).

Although Petitioner mentions *Clark*, supra, in her Petition, she actually ignores what the Court held. That was the case of a California resident who died in 1942, willing certain real and personal property to four relatives who were nationals of Germany. Six California heirs filed a Petition for determination of heirship and the Attorney General filed a suit under the Alien Property Act to escheat the property to the State. In this opinion the Court quoted Article IV which is identical with the Article here in question and after so doing specifically held:

> "The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of 'any person' holding realty in the United States."

Although this case did not involve the passage of time in excess of three years, since suit was brought within one year after the deceased passed away, the Court held that the aliens' rights were the rights under Article IV of the Treaty and at page 965 stated: "In summary, we hold that disposition of the realty is governed by Article IV of the Treaty". This case holds specifically that Article IV does control insofar as the realty is concerned.

Apparently the trial Court held that H. E. McGowan owed some legal obligation or duty to notify the widow of his deceased brother of her Treaty rights, about which he knew nothing, and of her inheritance before the three year period in which to sell would come into play. Yet, there is not a single case in the books which

we have read which construes Treaties of like kind and character which has ever held that there is any obligation or duty on the part of anyone to notify an alien heir of his rights under the Treaty or of his interest in property which he might sell within a period of years after his interest comes into being. Not a single case has enunciated this rule. Every case which has been tried to a conclusion where the passage of time was materially in excess of the three year period, in which the claimants offered no proof as to why the three year period should be reasonably prolonged, have been decided adversely to the aliens.

Petitioner argues that the meaning of due process in Article I of the Treaty means knowledge of Treaty rights and notice of inheritance on the part of an alien before the three year period to sell would begin to run. The Treaty does not so provide and no case has held that this is true. Due process as we construe the meaning, grants to the claimant when claim is made the right to have his day in Court, to be heard and given a chance to show cause, if any he can, why the Treaty provision should not be enforced as written and to offer proof as to why the three year period to sell should be prolonged. This is exactly what happened in this case. Petitioner has been afforded due process. She and others filed suit to secure and protect what they consider to be their property rights. They were all summoned into Court where they asserted that the provisions of the Treaty should prevail. They offered no proof as to why the three year term to sell should be "reasonably prolonged if circumstances render it necessary,". They have no grounds upon which to complain about the lack of due process. Undoubtedly, the

party claiming that there should be prolongation of the term in which to sell has the burden of proof to produce facts which will justify the Court in prolonging the term. Otherwise the alien loses his rights at the end of the three year period and no longer has any title to the property in question, as was held in the opinion of the Fifth Circuit Court of Appeals.

If the alien demonstrates a lack of diligence or interest, why should not the period run as specified? Ignorance of the law is no excuse. There are numerous cases which are analogous to the present situation. One who claims property adversely does not have to notify the record owner or advise him of his legal rights.

H. E. McGowan was and had been claiming this property adversely, not only to his brother, but his brother's widow for many, many years. The case of *Bonds v. Bonds*, (Miss. 1956), 84. So. 2d 397, holds:

> "Ordinarily ignorance of his or her legal rights by person against whom land is claimed by adverse possession is no defense against running of statutes of limitations. Code 1942, Sections 709, 711."

It was encumbent upon the widow of McGowan or her heirs to take some action and do something toward selling the land within the period of time prescribed by the Treaty or present evidence of some reasonable cause other than ignorance as to why they did not do so. They did nothing. There is no evidence that anyone involved was ever misled directly, or indirectly, by H. E. McGowan, or anyone else.

As was stated very succinctly in the opinion of the Fifth Circuit Court of Appeals (A. 38), the widow of McGowan was represented by counsel, who, presumably advised her of her legal rights during the Intestate Succession as evidenced by Exhibits D-14 and D-1 (Ex. Vol. II). She knew the names and addresses of two of her husband's brothers yet she never made inquiry during her lifetime about anything. Certainly neither of them could have known anything about her whereabouts when she went back to Honduras in 1958, one year after the death of her husband (Apx. V. 1, p. 271).

There are several cases which have construed Treaties having provisions similar to Article IV of the Honduran Treaty although no case has actually construed Article I, as such.

One of the leading cases is the case of *Miller v. Clausen*, 8 Cir., (1924), 299 F. 723, appeal dismissed 269 U.S. 595, 46 S. Ct. 105, 70 L. Ed. 431 (1925). The substance of this case was set out in the opinion of Judge J. P. Coleman of the Fifth Circuit Court of Appeals and will not be repeated here (A. 40-41). This was the case of an unexplained lapse of five years and this Court held that there was a failure of the conditions imposed by the Treaty and that title failed by operation of law. Petitioner attempts to distinguish this by pointing out that this Treaty did not have Article I therein, but this argument was effectively disposed of by Judge Coleman in his opinion (A. 40-41).

The general rule in this regard is stated in 3 Am. Jur. 2d, *Aliens and Citizens*, Sec. 34, p. 883, as follows:

"* * * A reasonable time specified in a treaty within which to sell the property is, in the absence of statutory regulation, necessarily a matter of judicial construction * * *" (P. 883)

"There is much discussion in the cases as to the nature of the title an alien holds under such a treaty. Some call it a base or qualified fee, and others a determinable fee. The terminology is not of controlling importance. That the right to sell carries with it the ownership as a necessary incident to the power of sale is clear. *Upon failure of the condition of sale or disposal imposed by the treaty, however, the title of the alien fails by operation of law and vests in the persons upon whom the state law would have otherwise cast it in the first instance.* (p. 884) (Emphasis Supplied)

See also the case of *Ahrans v. Ahrans*, Iowa, 123 N.W. 164. This involved a Treaty with no specific time stated in which the Iowa Supreme Court held that eight years without selling the property and without explanation was not a reasonable time.

Ahrans was cited with approval and followed in *Pierson v. Lawler*, Neb., 161 N.W. 419. This involved a Treaty with the exact language of Section IV although not Section I. This case held that an attempt to sell more than eleven years after the death of the owner was too long and that "circumstances showing a necessity for prolonging the period a sufficient length of time to uphold the conveyance from Mary Young to

plaintiff are not proved" (p. 421). Exactly the same situation obtains in this case.

See also *Yeaker's Heirs v. Yeaker's Heirs*, 61 Ky. 33, affirmed 19 L.Ed. 571, (1862), in which the Court held that a period of six years without selling the land and without explanation was too long to wait.

Since Article I says that aliens are entitled to, "that degree of protection that is required by international law", Petitioner says she should prevail regardless of the facts.

International Law requires the protection of only that which a state allows, subject to whatever modification the Treaty affords. Mississippi allows no inheritance of realty by a Honduran national, but the Treaty in Article IV modifies this to give a Honduran national a defeasible fee. Article I, therefore, protects the Honduran national only in the ownership of his defeasible fee, which must be sold within three years. When this is lost because of his failure to act, there is nothing left for Article I to protect. The alien has lost his defeasible fee under the very terms of Article IV of the Treaty. Articles I and IV must be construed together.

See *International Law* by Charles Cheney Hyde, Second Revised Edition, Volume 1, Sec. 203, p. 650, et seq., The Private Ownership and Control of Property.

Petitioner argues that the Treaty must be interpreted most liberally so as to award the property here in question to her. Liberal interpretation of a Treaty

does not mean changing the meaning of the entire document. One of the best statements on this point is found in the case of *Corbet v. Stergios*, 126 N.W. 2d 342 (Iowa — 1964). This case involved the construction of certain state statutes and a Treaty between the United States and Greece which had a "most favored nation clause". It was different in numerous respects from the Treaty with which we deal, yet the principle enunciated remains the same. It is interesting to note that the parties claiming the benefit of the Treaty in that case used some of the identical arguments which are used here. In answer thereto, the Iowa Supreme Court stated:

> "The fourth brief point of appellant is that treaties should be interpreted liberally so as to give effect to all rights which may reasonably be claimed thereunder. This theory of liberal treatment is considered in Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218; Doehrel v. Hillmer, 102 Iowa 169, 71 N.W. 204. *Liberal interpretation is all right as to doubtful clauses, but it must not change the meaning of a treaty.*
>
> In the case of Doehrel v. Hillmer, supra, we said:
>
> '[W]here a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.'

This theory is correct where two constructions are possible, but in the first place there are no two constructions to be differentiated in the case at bar, and in the second place the theory of liberality does not reach to the point of changing the clear meaning of treaties and statutes. We are not faced with the dilemma in the instant case.

A treaty between nations is dual in purpose. It establishes broad political and commercial rights as between the governments of the two nations. It also grants privileges, rights and obligations between the citizens of each nation, commonly known as nationals. 87 C.J.S. Treaties Secs. 1 and 2; 52 Am.Jur., Treaties, Sections 1 and 4.

In a judicial construction of a treaty the same general rules apply as pertain to contracts and statutes. As in such cases, the intention of the parties shall have primary consideration. 52 Am.Jur., Treaties, section 12. In re Anderson's Estate, 166 Iowa 617, 147 N.W. 1098, 52 L.R.A. N.S., 686.

As pertaining to the case at bar some of the statements in Am.Jur., supra, are relevant. '* * * a treaty should be given such a construction as will avoid unjust and unreasonable conclusions * * * * and such as tends to the common advantage of the contracting parties * * * *but not such as will put aliens on a more favorable footing than our own citizens.' Also*

> *'The Courts are not required to * * * place an unreasonable interpretation on it, for the purpose of securing to foreigners privileges which are denied to citizens of this country.'* "
> (Emphasis Supplied)

Our own Supreme Court follows the same view as the Iowa court as to judicial construction of treaties, contracts and statutes. In the early case of *Anderson v. Lewis*, (Miss. 1843), Freem. Ch. 178, our Court stated:

> "Where individual rights vest under a treaty, the meaning of the treaty, in respect to them, is to be construed by the same rules as private contracts."

The same rule of construction of statutes is in effect in Mississippi and numerous cases may be found in 13 *Miss. Dig.*, Sec. 206, p. 318. Among these cases, is a United States Supreme Court case, *U.S. v. Boisdore's Heirs*, 49 U.S. 113, 8 How. 113, 12 L.Ed. 1009 (Miss. 1850), which enunciated the following rule:

> "In expounding a statute, the Supreme Court must not be guided by a single sentence or member of a sentence but must look to the provisions of the whole law and to its object and policy."

If it had not been the object and the policy of the treaty writers that an alien would have to avail himself of his opportunity to sell realty in the United States within a three year period of time, or show good cause why he did not do so, Article IV could have and would

have been eliminated. Yet, it is the Article most common in dozens of treaties from our earliest history to the present time. It would have been simple for the authors of treaties to rewrite them (as the Trial Court in effect did) by omitting Article IV and insert in Article I language that, "real property can never be taken from an alien until and unless he has been notified of his inheritance, advised of his rights, has been offered the fair market value for the property and refused to accept same". The position of Petitioner and of the Trial Court just does not comport with reason and equity.

III. Mississippi's Alien Statute and Escheat

Petitioner states that Section 842 of Mississippi Code of 1942, now § 89-1-23, Miss. Code Ann. (1972), is discriminatory and an intrusion of the state into foreign affairs since it allows non-resident alien citizens of Syria or the Lebanese Republic to inherit property from citizens or residents of Mississippi, but denies that right to all other non-resident aliens. Petitioner uses the same novel, although specious argument, she used in the lower Court. It is said that in order to make the statute valid, we should read into the statute that all aliens may take property regardless of residence, in other words, judicially repeal a statute which has been on the books since 1892.

Judge Coleman answered this argument in his opinion, pointing out that the Fourteenth Amendment has no application to aliens not within the jurisdiction of the United States; that this statute was not attacked in the District Court and there was no request that a three

judge Court be convened and that in any event when the statute was last amended in 1940, to allow Syrians or Lebanese to inherit, it contained a severability clause, Section 4 (A. 45).

Under the authority of *Lawrence v. Mississippi State Tax Commission* (1931), 162 Miss. 338, 137 So. 503; affirmed, 286 U.S. 276, 52 S.Ct. 556, 76 L. Ed. 1102, 87 A.L.R. 374, if the portion of the statute as to Syria or Lebanese aliens makes the statute invalid, it would revert to the previously existing valid statute prior to 1938 and the non-residents still could not inherit. As also shown by Judge Coleman, if all the statutes as to non-resident aliens were set aside, the status of a non-resident alien under our common law would prohibit her owning land in Mississippi. *Scottish American Mortgage Company v. Butler,* (1911) 99 Miss. 56, 54 So. 666 (A. 44-45).

The "dog in the manger" argument that if Petitioner cannot acquire the property it should escheat to the state is settled by the statutes of the State of Mississippi. As stated by Judge Coleman, Section 89-1-23, Mississippi Code Ann. (1972) must be read in conjunction with § 89-11-1, Miss. Code Ann. (1972) which escheats property to the State only when a person dies intestate, *leaving no heir capable of inheriting the property* (Emphasis Supplied). See *Mississippi College v. May,* (1959), 235 Miss. 200, 108 So. 2d 703 (A. 46).

IV. The Fiduciary Argument and Fair Play

Finally, Petitioner argues that Hamilton McGowan was a "fiduciary" to the widow of his deceased brother.

The lower Court did not so find and this is not in accord with the facts as was very ably stated in the opinion of Judge Coleman (A. 41-43). If there was a fiduciary relationship between Hamilton and Elbert, his brother, it did not extend to the wife. Before Hamilton even knew of the existence of a sister-in-law, his brother had died and such relationship as may have existed as between the brothers was dissolved by death, Elbert dying childless, *Wilbe Lumber Company v. Calhoun*, (1932) 163 Miss. 80, 140 So. 680 (A. 41).

Petitioner talks about "fair" play and "foul" play and that Hamilton McGowan, secretively devised a plan to claim the land adversely for himself. Nothing could be further from the truth. If the record shows anything at all, it shows that Hamilton McGowan was claiming and thought he owned this land adversely to the whole world from 1936 to date.

V. Cases Distinguished

Petitioner cites several cases to support her contention that liberal treaty construction demands that the decision of the Fifth Circuit Court of Appeals should be reversed but these cases are actually not in point on the facts as related to this case. Numerous cases enunciate the rule that if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. None of these cases, however, hold that the Court may add to or take away from the actual terms of the treaties themselves.

The case of *Factor v. Laubenheimer*, 290 U.S. 276, 54 S. Ct. 191 (1933) cited by Petitioner, enunciates an

abstract principle of law which is not applicable to the case at bar. That case involved the interpretation of an extradiction treaty relative to the commission of a crime.

Hauenstein v. Lynham, 100 U.S. 483, 25 L. Ed. 628 (1879), construed a Swiss treaty and is not in point in anywise. In this treaty the alien had the right to withdraw and export the proceeds derived from the sale of property "at all times". There was no statute of limitations. This case was discussed in the case of *Moody v. Hagen, et al* (N.D. — 1917), 162 N.W. 704. The Supreme Court of North Dakota stated:

> "The case of Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628, involved the estate of a citizen of Switzerland who was a resident of Virginia and the claimant was also a citizen of Switzerland. The provisions of the treaty therefore were clearly applicable to the parties, and though a liberal doctrine of construction was applied as to the express terms of the instrument, *there was no attempt to add to the treaty other terms which were not included in it.*" (Emphasis Supplied)

None of the other cases discussed by petitioner as support for the "liberal interpretation" theory have anything to do with the treaty relating to the sale of land, save and except the case of *Dutton v. Donahue*, 8 P. 2d 90, 79 A.L.R. 1355 (Wyo. 1932). This case involved treaty provisions similar to Article IV. It did not involve a contest with local heirs who otherwise would have inherited the property after the expiration of the

three year period to sell, but involved the question as to whether or not lands should escheat to the State. Essentially the decision was that, "any doubt as to whether the property is subject to escheat should be resolved against the State". Again the Court held that the question of the reasonableness of prolongation is a matter of fact for the Courts to determine after proof.

Petitioner quotes out of context from numerous cases which support the theory of liberal construction and other matters. These cases do not relate to anything even closely akin to the facts in the case at bar. In *Asakura v. City of Seattle*, 265 U.S. 332, 44 S. Ct. 515 (1942), a treaty with Japan allowing Nationals to carry on "trade" was held to include the operation of a pawn shop. *Jordan v. Tashiro*, 278 U.S. 123, 49 S. Ct. 47 (1928) held that fishing for "commercial" purposes to carry on a "trade, wholesale and retail business", included the leasing of land, on which to construct a hospital.

Todok v. Union State Bank of Harvard, Neb., 281 U.S. 449, 50 S. Ct. 363 (1930) is quoted as construing a treaty with Norway holding that "goods and effects" included land and allowed the disposition without restrictions. It is stated that this is authority for the position of Petitioner. Nothing could be further from the facts. In *Todok* the Court held that the treaty did not apply in that case. A citizen of Norway who lived in Nebraska and who claimed homestead exemption executed deeds to his homestead prior to his death. His wife, who was in Norway, did not join in the instruments, and the Court held that the treaty did not make valid the conveyances since the absent spouse did not join in the conveyances and the deeds were void.

We have no quarrel with the quotation from the case of *Sullivan v. Kidd*, 254 U.S. 433, 41 S. Ct. 158 (1920) which stated that "* * * All parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole". (254 U.S. 439). This case is not in point in any wise on its facts. A reasonable construction of the Honduran Treaty on the facts of our case could lead only to the ultimate result reached by the Fifth Circuit.

The quotation from *De Geoffroy v. Riggs*, 133 U.S. 258, 10 S. Ct. 295 (1890) is a good abstract statement of treaty construction which has nothing to do with this case.

The case of *Johnson v. Robison*, 94 S. Ct. 1160 (1974), cited by Petitioner has no place in this brief. This was the case of a conscientious objector to military service who performed civilian service. Upon being denied educational benefits such as military veterans were entitled to receive, he brought a class action. The lower Court held that there could be judicial review of decisions of the Administrator of Veterans' Affairs on this question of law and fact and that failure to grant benefits violated the guarantee of religious freedom and equal protection of the lands. The Supreme Court held that the sections of the law which prohibited the objector from participating in educational benefits did not violate the guarantee of religious freedom nor deny him equal protection of the laws. This has nothing to do with treaty interpretation.

The cases of *Quong Ham Wah Co. v. Industrial Accident Commission*, 192 Pac. 1021, 12 A.L.R. 1190, error dism. 255 U.S. 445, 41 S. Ct. 373 (Cal. 1920), *Sugarman*

v. Douglass, 413 U.S. 634, 93 S. Ct. 2842 (1973) and *Weinberger v. Wisenfeld*, 95 S. Ct. 1225 (1975) do not involve the construction of treaties. The *Quong* case involves the extension of workmen's compensation benefits to an alien worker as if he had been a citizen of the State of California. *Sugarman* provided that a resident alien could take a civil service examination and hold a civil service position. *Weinberger* granted social security benefits to widowers as well as to widows. The cases have no application to the case at bar.

Petitioner argues that the case of *Guiseppe v. Cozzani*, 238 Miss. 273, 118 So. 2d 189 (1960); 248 Miss. 588, 159 So. 2d 278 (1964); and 193 So. 2d 549 (1966) is authority for her position and controls the case at bar. As was said in the opinion of Judge Coleman, this is just not true since this case, which went to the Supreme Court of the State of Mississippi three times, was decided completely on the question of fraud and not on an extension of time under the treaty (A. 46-47).

CONCLUSION

From the very beginning of this case, there has been much talk and lip service as well as legal argument about the rights of aliens, and particularly the aliens involved herein. This Court and the other Courts have heard much about "due process of law", "notice", "fair play", "non-discrimination", "liberal construction of treaties". To put the matter in perspective, the Court must remember that for sixty years Hamilton McGowan occupied, used and for most of said period thought he owned the land, which was ordinary farm land. Had this land not have become valuable for oil and oil been discovered on the property shortly after this suit was filed, the so-called alien heirs might have lived in Honduras or elsewhere for a hundred years and no one would have ever questioned the title of Hamilton McGowan, or his heirs. It was only after the property became valuable for oil that those who will profit most if Tenorio wins this suit began the search for the aliens. All at once these philanthropic minded Mississippians became extremely concerned that the rights of ignorant, non-English speaking aliens be protected and preserved. Fourteen years of doing nothing should be ignored in the interest of fair play and nondiscrimination, regardless of Treaty provisions. The burden of Petitioners' argument actually is that length of time, unexplained inactivity, no matter how long makes no difference in the rights of aliens to inherit land under the Treaty until and unless, some unamed person, somewhere, some day, some way actually advises said aliens of their Treaty rights, their inheritance and offers to pay fair market value for the land. Then and only then will the three year Treaty provision begin to run (see Judge Coleman's opinion on this point A. 43).

Perhaps no one could have expressed the reasoning behind this lawsuit better than the Petitioner at page 15 of her Brief filed before the United States Fifth Circuit Court of Appeals. Her stated reasons are most interesting.[1]

Petitioner in the statement from her brief, set out herein, finally "told it like it is." For fourteen years the value of the land didn't justify the expense or effort to claim same. It wasn't worth the gamble. However, when the "sweet smell" of oil reached the nostrils of Mississippi "oil sleuths", they unearthed the aliens and became extremely solicitous of their welfare. They were willing to and are bearing all the expense of this suit even to the Supreme Court of the United States.[2] It was then that prolongation became vitally

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1 "From the circumstances in evidence, as outlined by the District Court, the inference is inescapable, and the District Court so held, that Obdulia was ignorant of her Clarke County inheritance from her husband, but even if she had known that the land existed as an asset of her husband's estate, the difficulties that she would likely have encountered in selling the land at a fair price or at any price, during the eleven-year space of her life after Elbert's death, would have been insurmountable. *In the first place, the value of the land, so far as then known, was limited to its utility for farming or pasture — hardly enough to even pay the expense of investigation by one in Central America. In the second place, any effort in this direction, as it now appears, would have been met with the opposition of Hamilton, who was in physical possession and this alone would have made the title unmerchantable, for no one for so little would have gambled so much.*" (Brief of Petitioner, 5 Cir., p. 15) (Emphasis supplied)

2 "Q. [by respondents' counsel]:
Mrs. Tenorio, who is financing this lawsuit for you?
"A. The company, the lawyer, I imagine.
"Q. Mrs. Tenorio, you have not spent any money of your own in order to come from your home in Honduras to participate in this trial, have you?
"A. No." (Apx. V. I, p. 287)

necessary, something at long last must be done to protect the rights of the aliens, for "it was now worth the gamble".

We believe that the Petition for Writ of Certiorari should be denied.

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REPLY

BRIEF

SUPREME COURT, U. S.

FILED

JUL 28 1975

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1586

DOROTEA ZALDIVAR V. DE TENORIO, ET AL.,
Petitioners,

vs.

H. E. McGOWAN, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF AUTHORITIES

CASES

Bacardi Corporation of America v. *Domenech*, 311 U.S. 150, 61 S.Ct. 219 (1940) 5

Factor v. *Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191 (1933) 5

Marshall v. *City of Vicksburg*, 82 U.S. 146, 15 Wall. 146, 21 L.Ed. 121 (1872) 4

Memphis & Charleston R. Co. v. *Neighbors*, 51 Miss. 412 (1875) 4

TREATY

Article I, Treaty of Friendship, Commerce and Consular Rights With Honduras, 45 Stat. at Large 2618 (December 7, 1927) 2, 5

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REPLY BRIEF OF PETITIONERS

The salient points have been covered in the petition, but there are some aspects of the response which seem to call for reply.

This stems in part from the open admission, or more precisely the assertion, that Hamilton was claiming title adversely, i.e., with hostility, toward his brother and then toward his brother's widow, but secretly so, awaiting the passage of time.

This admitted mental attitude of secret hostility has a significant bearing upon the equities of the case, which equities, in turn, define to some degree the minimum reach of the "most constant protection and security" vouchsafed by Article I of the Honduran Treaty to the nationals of each country.

As the Court readily can see from Respondents' inflammatory "Conclusion", there is an acute outcropping of prejudice which, in some degree, is also articulated, albeit in a more temperate tone, in Judge Coleman's majority opinion.

Mrs. Tenorio's rights are equated in the argument with that of "oil sleuths" who "unearthed" the aliens and "became extremely solicitous of their welfare," etc., an argument which had its effect upon the author of the majority opinion of the Court of Appeals.

Compare Judge Coleman's language:

> ". . . There was no effort to enforce the Treaty rights until an oil well had been brought in, whereupon the Treaty was dusted off in an effort to scramble the title. . . ." (Apx. A43)

With deference, when invocation of a Treaty of Friendship which grants to the nationals "the most constant protection and security" for their properties is twisted by construction into a "dusting off" process in "an effort to scramble the title," then, we submit, it is time for this Court to take a firm hand in the matter, because this hostility toward the treaty claims of federally favored aliens undermines the spirit and ignores the letter of such treaties.

It is quite true that the lessees of Mrs. Tenorio sought her out and informed her of her rights for selfish reasons,

just as Hamilton McGowan remained silent and secretly claimed the land for his own for selfish reasons. The difference is that Mrs. Tenorio's oil lessees seek to protect her retained royalty rights along with their own leasehold rights, but McGowan and his own lessees, on the other hand, seek to destroy those rights, claiming that Mrs. Tenorio's ignorance and McGowan's concealment and secret hostility are enough to turn the trick. In any case, the question is: Should Mrs. Tenorio, as a Treaty beneficiary, suffer prejudice by reason of the selfish actions of others, whether such actions are friendly or unfriendly?

More precisely, does the imposition of this kind of prejudice satisfy the Court's obligation to accord to Honduran Nationals, under a liberal view of treaty claims, the "most constant protection and security" for their property and the further obligations to stand firmly in the way of any attempt by anyone to take that property "without due process of law and without payment of just compensation," as the Treaty plainly requires?

We respectfully submit that unless this Court acts now to re-establish the canon of liberal construction and to apply this in the broad area of property rights granted under Treaties of Friendship and Commerce, the spirit of fair dealings between nations under numerous such treaties will suffer a serious blow and the good faith of this nation could well become suspect as a result.

Fair notice and not designed concealment is the ingredient of due process of law, especially where, as here, the contest is with a fiduciary who now admits to an attitude of selfish but secret hostility all along. Hamilton's attitude of undisclosed hostility, as now brazenly admitted and even asserted in his brief before this Court, was described by Judge Godbold, dissenting, as being "*too*

strong for the nostrils of an able and experienced trial judge. It is too strong for mine as well." (510 F.2d at 103, here at Apx. A48).

It is certain that Mrs. Tenorio needed protection from such hostility. It is equally certain that the Treaty guaranteed at least this much in terms of "the most constant protection and security". We urge this Court to vitalize the Treaty in this very important aspect. Otherwise, the Treaty is left filled with high sounding but impotent words and the canon of benevolent liberal construction, as heretofore respected, is reversed in favor of a harsh one of forfeiture,—a result always abhorrent to equity, even apart from treaties.

Marshall v. *City of Vicksburg*, 82 U.S. 146, 15 Wall. 146, 21 L.Ed. 121 (1872), a case arising in Mississippi, states:

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. Livingston v. Tomkins, 4 Johns. Ch. 415; 2 Store Eq. §1319." (5 Wall. at 149)

In *Memphis & Charleston R. Co.* v. *Neighbors*, 51 Miss. 412 (1875), it was held:

> "A court of equity declines to lend its aid to enforce a forfeiture. Judge Story lays down the doctrine broadly, 'that it will never enforce either a penalty or a forfeiture;' and adds, 'therefore it will never aid in the divestiture of an estate for a breach of a covenant on a condition subsequent, although it will often interfere to prevent the divestiture of an estate for a breach of covenant or condition. . . .'" (51 Miss. at p. 418)

The "condition subsequent" in this case was that the land be sold in three years, but the failure was not automatically to cause a forfeiture under terms of the treaty, because this term was mandatorily "*to be**" reasonably prolonged if circumstances render it necessary."

The majority panel of the Court of Appeals allowed for no circumstances other than affirmative and knowledgeable actions by the non-resident Honduran heirs within the three year minimum term, thereby importing stringent conditions of forfeiture which are not to be found anywhere in the Treaty and which find no support in equity and which flatly negate the protective guaranties of Article I of the Treaty.

On the other hand, the Treaty, to say the least, fairly admits of a different construction. The alternative construction would simply allow prolongation whenever such is reasonably necessary to carry out the promises of Article I of "the most constant protection and security" and "due process of law" and "just compensation." Given this as a permissible alternative construction, the decisions of this Court, exemplified by *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S.Ct. 191 (1933) and *Bacardi Corporation of America* v. *Domenech,* 311 U.S. 150, 61 S.Ct. 219 (1940), require its adoption in this case, because

> ". . . if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." (Citations omitted.) *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S.Ct. 191 (1933).

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*The term "to be" was used in lieu of a discretionary "may be".

CONCLUSION

We deal with a sensitive subject. The Treaty paves a two-way street. Like many others, the Honduran Treaty is called a "Treaty of Friendship." It embraces the Golden Rule. It borrows concepts of fair play from our own Constitution to guarantee just compensation and due process of law. The spirit is one of constant protection, security and friendship, not of concealment, hostility and forfeiture. It should be applied in this spirit, not grudgingly and narrowly, but liberally and broadly to assure, in practice, that "most constant protection and security" of which it speaks so eloquently and which the Nationals of each country have been led to expect in territories of the other.

Respectfully submitted,

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